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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210559
Party	Plaintiff NetCloud, LLC
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<b>NetCloud, LLC</b>	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. <u>91210559</u>
	)	
<b>East Coast Network Services, LLC</b>	)	
	)	
Applicant.	)	
_____	)	

**OPPOSER’S RESPONSE TO APPLICANT’S MOTION FOR  
RECONSIDERATION OF FINAL DECISION**

Opposer Netcloud, LLC (“Opposer”) hereby files this Response to Applicant’s Motion for Reconsideration of Final Decision. Because Applicant has failed to demonstrate how the Board erred in reaching its decision, the Board should deny Applicant’s Motion for Reconsideration in its entirety.

**ARGUMENT**

**I. Applicant’s Argument that Opposer Did Not Plead Use By Any Entity or Individual Other Than NetCloud, LLC**

In its Motion for Reconsideration, Applicant first argues that Opposer did not provide sufficient notice of the basis of Opposer’s claim because the Notice of Opposition failed to specifically plead use of the NETCLOUD mark by any of Opposer’s predecessors-in-interest. Applicant’s Motion, 1. Without citation to any legal precedent or support whatsoever, Applicant asserts that Opposer was obligated to plead prior use of NETCLOUD by Raj Viradia and Mehul Satasia in order to give fair notice of Opposer’s claim and the grounds upon which it rests.

The Notice of Opposition clearly states that “[s]ince long before any date on which Applicant could reasonably rely, Opposer has been continuously using the trademark

NETCLOUD in commerce in connection with cloud virtual private server (cloud VPS) services and cloud hosting services.” Notice of Opposition, ¶ 1. There is nothing misleading or vague about this statement. By virtue of the trademark assignment transferring all rights in the NETCLOUD mark from Raj Viradia to Mehul Statasia, and the subsequent assignment transferring all rights from Mehul Statasia to Opposer (both of which were provided to Applicant during discovery and properly made of record during Opposer’s testimony period), Opposer acquired all common law use rights from its predecessors-in-interest such that their use became Opposer’s use. As such, it is without dispute that Applicant was on notice of Opposer’s claim that it was using NETCLOUD in commerce prior to any actual or constructive use of the same mark by Applicant.

In its Motion for Reconsideration, Applicant notes that the Board struck Exhibits A, B, and C from Opposer’s Rebuttal Brief because (1) all evidence must be entered into the record during the trial period, (2) Opposer cannot make of record its own Responses to Interrogatories, Responses to Requests for Documents, and Initial Disclosures, and (3) requests for discovery, responses thereto, and disclosed documents should only be filed with the Board in five circumstances not applicable to the instant proceeding. Board’s Decision, 6.

Although the Board’s ruling striking the exhibits did not negatively affect Opposer in that it still prevailed in the opposition, Opposer believes the Board erred in striking the exhibits. Opposer attached to its Rebuttal Brief its own initial disclosures and discovery responses *for the sole purpose* of impeaching Applicant’s assertion in its Trial Brief that it was not put on notice of Opposer’s predecessors-in-interest prior to trial. Opposer’s Rebuttal Brief, 5-6; Ex. A-C. Applicant made this unanticipated and outlandish claim *for the first time* in its Trial Brief, thereby necessitating the attachment of Opposer’s initial disclosures and discovery responses to

its Rebuttal Brief. To be sure, Opposer did not use the exhibits as evidence to support or bolster *its own case* of priority and likelihood of confusion. That would clearly be in violation of the Board's rules of practice and procedure. Rather, Opposer merely used the exhibits to address and rebut Applicant's evidentiary objection and to show the Board that Applicant was lying about its lack of notice. Needless to say, it is patently unfair for the Board to permit Applicant to raise an evidentiary objection and then not allow Opposer to utilize the *only* means it has to address and rebut the objection. Otherwise, the defendant in an opposition could make all kinds of evidentiary objections for the first time in its trial brief alleging non-disclosure of witnesses, non-disclosure of documents during discovery, lack of service of initial disclosures, etc. and the opposer would have absolutely no means to rebut such objections.

Although Applicant continues to maintain that it was not on notice of Opposer's predecessors-in-interest due to the fact that they were not mentioned in the Notice of Opposition, it is indisputable that Applicant was on *actual* notice of Raj Viradia and Mehul Satasia by virtue of Opposer's initial disclosures and discovery responses.

## **II. Applicant's Argument that Opposer Did Not Establish *Bona Fide* Use**

Finally, Applicant asserts that the use of NETCLOUD by Opposer and its predecessors-in-interest is "too insignificant to establish *bona fide* trademark use." Applicant's Motion, 5. Essentially, Applicant argues that the relatively few clients served and small amounts of money earned by Opposer's predecessors-in-interest during the time of their ownership of the NETCLOUD mark is not enough to justify a finding of priority over Applicant's application filing date.

Certainly, the amount of revenues earned cannot, by itself, be what determines whether legitimate trademark rights have been acquired. If such were the case, any entity which provides

its products/services at no cost or for a penny per year could never acquire common law trademark rights. The same is true for the number of customers served. It is entirely possible that only a tiny fraction of the purchasing public would ever have the need for a particular product/service. Or, perhaps the type of product/service is so new and unfamiliar that it takes a significant period of time to introduce the product/service to the public and to build a substantial customer base.

While Applicant spends much of its brief focusing on cold, hard numbers and citing to cases that are not binding on the Board and may not even be factually similar to the instant case, it completely ignores what really matters under the Lanham Act, which is whether there is a *bona fide* use of the mark in the ordinary course of trade, and not made merely to reserve a right in the mark. The evidence submitted by Opposer during its testimony period overwhelmingly demonstrates such *bona fide* use of the NETCLOUD mark by Opposer and its predecessors-in-interest prior to Applicant's application filing date.

### **CONCLUSION**

In conclusion, Applicant has not demonstrated any error by the Board concerning the facts of the case or the applicable law. Therefore, Opposer respectfully requests that the Board deny Applicant's Motion for Reconsideration of Final Decision.

Respectfully submitted,

NETCLOUD, LLC

By: \_\_\_\_\_/met20/

Dated: \_\_\_\_\_ 4/13/2015

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing has been served by emailing said copy on \_\_\_\_\_ 4/13/2015 \_\_\_\_\_ to:

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